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MICHAEL RODAK, JR.,

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1426

UNITED TRANSPORTATION UNION, a labor organization, (UTU), A. H. CHESSER, President, (UTU), R. W. GUY, General Chairman, (UTU), G. R. PERKINS, General Chairman, (UTU), R. H. WOODHAMS, Vice General Chairman, (UTU), JOHN R. BURGE, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,

Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
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No.

UNITED TRANSPORTATION UNION, a labor organization, (UTU), A. H. CHESSER, President, (UTU), R. W. GUY, General Chairman, (UTU), G. R. PERKINS, General Chairman, (UTU), R. H. WOODHAMS, Vice General Chairman, (UTU), JOHN R. BURGE, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,
Petitioners,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, United Transportation Union, a labor organization, prays that a Writ of Certiorari issue to

review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case No. 72-2013 on February 4, 1974.

OPINIONS OF THE COURTS BELOW

The opinions of the Courts below are attached hereto and labeled Appendices A and B.

As stated in the opinion of the Ninth Circuit, in November, 1961, certain herder (switchmen) agreements were entered into between Southern Pacific and its switchmen, giving the switchmen exclusive rights to align switches in the performance of herding work and prohibiting the performance of this work by road crews.

The evidence presented to the trial judge in the District Court was entirely by affidavits and declarations. These declarations related to the negotiation of a national agreement which was not resolved until January, 1972. In negotiating the national agreement, President Biaggini of the Southern Pacific in negotiating the agreement with Charles Luna, the president assured Mr. Luna that he need not worry about the situation in the newly merged union, as Article 9 of the newly proposed agreement would not be applied by the Southern Pacific to displace herders, or if any, only a very few in the back shop and roundhouse areas. Relying on these representations of Mr. Biaggini, the president of the United Transportation Union signed the agreement, including Article 9, and

thereafter Southern Pacific abolished some sixteen herder jobs, including various herders situated where Mr. Biaggini said they would not be affected. (Kesecker affidavit, R.T. p. 155; Burge affidavit, R.T. p. 158; Burge affidavit, R.T. p. 134; Blazin affidavit, R.T. p. 92).

As stated by the Court of Appeals, the Union asserts that the District Court erred in that the undisputed record evidence required the District Court to deny all equitable relief to Southern Pacific because:

> "(1) [Southern Pacific] should be by the conduct of its president estopped to claim such relief because of its misrepresentations and bad faith in connection with the inception of the agreement on which the railroad relies.
>
> "(2) Because of fraudulent and mistaken representations so made at the inception of the agreement."

PARTIES' CONTENTIONS

We summarize Union's contentions as follows:

(a) That Article IX does not incorporate a separate oral agreement with Southern Pacific concerning its herders and was reached and made during the course of the national bargaining negotiations. Hence, Article IX is not a binding agreement between these parties under the rationale of *Anaconda Wire and Cable Company v. National Labor Relations Board,* 444 F.2d 1028 (7th Cir. 1971).

(b) Mr. Biaggini as president of Southern Pacific made certain false representations as to the number of herder positions which would be abolished under the proposed Article IX. That the Union relied in good faith upon those false representations and ceased further collective bargaining on the Article. Hence, Southern Pacific should be estopped to implement the Article adverse to those representations under the rationale of *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, citing *Insurance Co. v. Wilkinson,* 13 Wall. 222.

Accordingly, Union urges that the 1961 herder agreements with Southern Pacific are legally still effective and the dispute looks to a new agreement concerning switchmen-herder duty assignments and falls within the "major dispute" category as delineated in *Switchmen's Union of North America v. Southern Pacific Co.,* 398 F. 2d 443 (9th Cir. 1968) at page 445, citing *Elgin, J. & E. Railway Co. v. Burley, et al.,* 325 U.S. 711, 723. Therefore, the restraint is violative of the Norris-LaGuardia Act, 29 U.S.C. §108.

Southern Pacific denies the actionable false statement factual premise urged by Union and further contends that:

(a) the National Agreement superseded the 1961 herder agreements, hence, Article IX is a valid subsisting agreement between the disputing parties, and

(b) the dispute arises from its reasonably susceptible implementation of Article IX and is a "minor dispute" within the jurisdiction of the Adjustment Board.

Accordingly, Southern Pacific contends that the restraint was proper under the rationale and holdings of *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D. C. Circuit 1972), cited and followed in *Southern Pacific Transportation Co. v. International Brotherhood of Electrical Workers, et al.*, 474 F.2d 696 (9th Cir. 1973).

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the interpretation of the Railway Labor Act, 45 U.S.C.A., Sec. 151, and the Norris-LaGuardia Act, 29 U.S.C.A., Sec. 108. There is an issue as to whether this is a major or minor dispute under the tests set out in *Elgin Joliette & Eastern Railroad v. Burley*, 325 U.S. 711 (1954) and also under the Norris-LaGuardia Act as to whether or not there was bargaining in good faith.

THE LAW

THE DISPUTE WHICH MOTIVATED THE LAWFUL STRIKE ACTION AROSE OVER THE RAILROAD COMPANY'S DENIAL OF THE FORMATION AND EXISTENCE OF SPECIAL HERDER AGREEMENTS WHICH MODIFIED ARTICLE IX, §1 OF THE NATIONAL AGREEMENT, AND HENCE IS A MAJOR LABOR DISPUTE.

In considering the threshold issue of the magnitude of the dispute, defendants submit that the basic au-

thority defining major and minor disputes, *Elgin, J. & E. R. R. v. Burley,* 325 U.S. 711 (1954), supports their position. The Court stated regarding major disputes:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past."

In the instant case, the affidavits of the defendants establish that a separate oral agreement was reached with the president of the Southern Pacific which varied the terms of Article IX, §1 of the national agreement. The parties clearly contemplated in the national agreement that other agreements might be reached. Article XV, §2(e) of the national agreement provides as follows:

> "This article will not debar management and committees on individual railroads from agreeing upon any subject of mutual interest."

It is a well-settled principle of law that several agreements connected in fact and in subject matter can be considered in evidencing the intent of the parties.

Schell v. Fauche, 138 U.S. 52, 34 L.Ed. 1040;
Salmon Falls Mfg. Co. v. Goddard, 14 L.Ed. 493.

It is further well settled that the parol evidence rule was never intended to perpetrate a fraud, and therefore parol evidence will be allowed to reform contracts entered into by mistake or fraud and to make them correspond to the intent of the parties.

Walden v. Skinner, 101 U.S. 577, 25 L.Ed. 963.

Parol evidence may show that the parties did not intend the written paper to be a complete and final statement of the whole transaction.

Seits v. Brewers Reefer Machine Co., 35 L.Ed. 836.

And in the recent case of *Anaconda Wire & Cable v. N.L.R.B.,* 444 F.2d 1028 (1971), it was held that the employer is legally obligated to incorporate into writing any agreement reached during the negotiations. In the case at bar, the affidavits of defendants reveal repeated efforts of the defendants to meet with the employer which were frustrated on every occasion. The national agreement itself has attached to it, as shown by the affidavit of L. W. Sloan, several agreements which modify the terms of the national agreement, yet the plaintiff refuses to acknowledge the fact that any agreement was negotiated or is in existence concerning the special herder agreements of 1961. Interpretation is not the issue, since the plaintiff denies the formation or existence of the agreement which modified the terms of the national agreement.

ESTOPPEL ARGUMENT

THE PRINCIPLE OF ESTOPPEL APPLIES TO PRESIDENT BIAGGINI'S STATEMENT

Defendants in good faith relied on the representations of the president of the Southern Pacific; and therefore the Norris-LaGuardia Act and the Railway Labor Act, 45 U.S.C.A. §151, et seq., protect the rights of the defendants to strike in this instance. By relying on the representations of the president of Southern Pacific, the defendants ceased further collective bargaining negotiations regarding the herder agreement, which it must be assumed would have continued had these special agreements not been protected. It is clearly the policy of the law to encourage negotiations and collective bargaining to settle labor disputes. When the union officials and membership relied on the representations of management, collective bargaining as to that issue was terminated. When the plaintiff failed to acknowledge the formation or existence of those representations and agreement after the national agreement was implemented, they foreclosed the union from collective bargaining negotiations. The plaintiff further, by failing to acknowledge that these representations and agreements were actually made, undermined the confidence that the union membership had in its leaders to engage in meaningful collective bargaining negotiations, and thus would destroy the basic concept of negotiating procedure. Therefore, the only alternative in this regard was a lawful strike by the union acting in good faith upon reliance of representations made by the company which were not acknowledged; and

this action is supported by the most recent authority of *Delaware & Hudson Ry. Co., et al. v. U.T.U.,* 450 F.2d 603 (Mar. 31, 1971).

This situation brings into play the rule as set forth in *Union Mutual Life Ins. Co. v. Wilkinson,* 13 Wall. 222, 233, 20 L.Ed. 617, 622:

> "The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

The above quotation was cited with approval in the case of *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 3 L.Ed.2d 770, 79 S.Ct. 760, where the Court held that the railroad was estopped to take advantage of misrepresentations of a claim agent in his dealings with an injured man. In the *Glus* case, the plaintiff had waited to file his action until the statute of limitations had run, but the Court held that "despite the delay in filing his suit, petitioner is entitled to have his cause filed on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, con-

ducted themselves in such a way that petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued."

Similarly, in the case at bar, we believe these authorities are applicable in reference to the binding effect of the representations of President Biaggini on the railroad and their estoppel to deny the effect of these representations. The Court of Appeals would disregard this phase of established law and class these contentions as "nonsense".

ARGUMENT

The parties to this lawsuit had pursued the procedures required by the Railway Labor Act without resolution of the dispute. At that time, both parties had authority to resort to the ultimate right of self help. See *Delaware & Hudson Ry. Co. v. U.T.U.*, 450 F.2d 603 (cert. den. June 7, 1971), holding that it was not unlawful for the union to pursue a selective strike and reversing the preliminary injunction.

The railroad does not come into court with clean hands to seek an injunction. The representation of President Biaggini of the Southern Pacific followed by removal of the herders constituted bad faith bargaining, and later this was confirmed by his marked reluctance to meet and talk with the union representatives or to keep appointments made (R.T. p. 79). See *Southern Ry. v. B. of L.F. & E.*, 384 F.2d 323 regard-

ing the requirement of good faith bargaining and also *Atlantic & West Point v. U.T.U.*, 307 F.S. 1205.

The conduct of President Biaggini and the later conduct of the railroad as to herders constituted a form of bad faith bargaining which was as bad as a refusal to bargain. It prevented further bargaining and kept the union from being able to meet the issue.

Mr. Biaggini admits in his affidavit and agrees that Southern Pacific would so apply the agreement as to have no substantial effect on herder positions, with the exception that the railroad did expect to discontinue positions of herders working on inside tracks and handling switches in connection with the movement of engines to and from ready tracks and engine houses, roundhouses, and shop areas. He further stated that it would not be Southern Pacific's intention to apply the agreement so as to eliminate herder positions where the men were used to tend switches which were used where trains were entering and leaving the yards at various locations (R.T. p. 145).

The affidavits of Kesecker (R.T. p. 155), Blazin (R.T. p. 95), Holland (R.T. p. 57), Burge (R.T. p. 81) show that the herders removed by Southern Pacific were not confined to those in roundhouse or shop areas, but included the ones which Mr. Biaggini stated would not be affected. President Biaggini by his own admission had told President Luna and Mr. Burge, the representative of his employees, not to worry about this, and that there would be "no substantial effect on herders' positions," and he referred to the positions which have subsequently been abol-

ished. (See Burge affidavit, R.T. p. 158 regarding inside herders.) This conduct flies in the face of *U.S. v. Fidelity Casualty of N. Y.*, 402 F.2d 893:

> "The principle is that where one party has by his conduct induced the other party to a transaction to give him an advantage which would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage."

This Court in equity should not allow the technical advantage thus obtained to be set up and relied on to defeat the ends of justice or to establish an unfair claim. The affidavits of all the employees, including Hayden (R.T. p. 97), Holland (R.T. p. 57), Kesecker (R.T. p. 59), Cody (R.T. p. 55), Lechner (R.T. p. 71), and Presidents Luna (R.T. p. 62) and Chesser (R.T. p. 66) show that the representation of President Biaggini was relied on by the organization and further collective bargaining was discontinued with this representation having been given.

We do not have here a mere question of interpretation, which would make a minor issue for the Adjustment Board. We have "the creation of a new agreement," looking to the future, as is referred to in the *Burley* case, supra. This oral commitment looked to the future in keeping the old agreement in effect rather than Article IX. It was not a mere question of the meaning of Article IX, but of the existence of an agreement as to the future and how it was to be applied. This is an abrupt change from the way in which Article IX was actually applied, and is the opposite of the national agreement, and so is not a

matter of mere interpretation. The railroad sought to explain it away by saying that the statement of their president was "conversation of one not directly involved in labor relations who is normally not even a participant in negotiations." The president of the railroad certainly was a competent spokesman for the railroad and was so chosen under the last section of Article IX of the National Agreement. He had the right to recognize that the old "special rules" would remain in effect; and their national agreement so contemplated by having this special section in it, reading as follows:

> "Section 2. The foregoing is not intended to impose restrictions with respect to any operation where restrictions did not exist prior to the date of this agreement. . . ."

Even the National Agreement had appended to it several separate Letters of Understanding. (See Exhibit A attached to "Entry 8" of Clerk's Transcript).

The evidence shows without dispute that after Mr. Biaggini had made these representations, the union leaders relied upon them and broadcasted to their membership and the interested members just what Mr. Biaggini had stated and were thereby lulled into a false sense of security. Being unaware of the consequences of this reliance, they ceased to bargain on the question and their only remedy was to strike when they found out that they had changed their position to their detriment with their reliance on the statement of President Biaggini. President Biaggini admits he did involve himself in this matter, and

that he did represent that the way the agreement would be applied would have no practical effect on the herders and to continue the special rules in effect. It would appear that the parties have a right to rely on what the president of the railroad admittedly has said and that they did rely upon it, to their detriment. There is no equity in granting an injunction to the railroad under such circumstances. The statement made was either false or mistaken; there was reliance and damage, all of which give the essential elements of fraud or misrepresentation in the inducement to the contract, which should allow reformation rather than an injunction under the rule of *Walden v. Skinner,* supra.

The parties here were involved under the rule of the *Burley* case, in a major dispute looking to the acquisition of rights for the future and not merely to the assertion of rights claimed vested in the past. They were in a dispute about a formal change in terms relating to the creation of a new agreement and not merely as to the meanings or the application of a particular past agreement. The rule is well stated in *S.U. of N.A. v. S.P.,* 398 F.2d 443:

> "Major disputes are those which relate to the formation of collective bargaining agreements or efforts to secure them. . . . A dispute is major only if an effort is made to bring about a formal change in the terms of an existing agreement or create a new agreement."

Section 8 of the Norris-LaGuardia Act, 29 U.S.C.A. §108, precludes injunctive relief if the railroad has

failed to fulfill its legal obligations, which include a showing of good faith. See *Rutland R.R. v. B. of L.E.*, 307 F.2d 21, which applies the "clean hands doctrine in a court of equity involving injunctive relief as to labor contracts; and inequitable conduct will not be condoned."

CONCLUSION

We respectfully request this court to review this case and to reaffirm the doctrine of estoppel of the *Wilkinson* and *Glus* cases so firmly embedded in our law that the railroad cannot take advantage of its own misrepresentations and still claim that it has bargained in good faith.

Dated, Oakland, California,
March 22, 1974.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioners.

HILDEBRAND, MCLEOD & NELSON, INC.,
Of Counsel.

(Appendices Follow)

In the United States District Court for the Northern District of California

Civil No. C-72-429 RFP

Southern Pacific Transportation Company, a corporation,
Plaintiff,
vs.
United Transportation Union, a labor organization, (UTU), et al.,
Defendants.

[Filed Apr. 3, 1972]

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came on to be heard upon plaintiff's application for a preliminary injunction and upon this Court's order to show cause and temporary restraining order issued March 10, 1972, the Court having considered the verified complaint, amended complaint and affidavits filed herein and arguments of counsel and being fully advised in the premises.

The Court finds that defendants caused and participated in a strike and work stoppage against plaintiff by taking concerted action to picket and strike plaintiff's lines of railroad in the States of California,

Oregon, Nevada, Utah, Texas and elsewhere on March 10, 1972, and that such strike and work stoppage caused plaintiff to curtail and eliminate transportation services and resulted in immediate and irreparable injury, loss and damage to plaintiff, to plaintiff's customers and to the public.

The Court further finds that on March 13, 1972, defendants engaged in a concerted layoff and work stoppage at Oakland, California, in order to force plaintiff to concede or acquiesce in defendants' interpretation of the work rules contained in the collective bargaining agreement between the parties dated January 27, 1972, and are likely to engage in other concerted layoffs, strikes and pressures in order to accomplish the object of forcing plaintiff to acquiesce to defendants' interpretation of said work rules. Said concerted layoff or work stoppage caused plaintiff to curtail and eliminate transportation services and resulted in immediate and irreparable injury, loss and damage to plaintiff, its customers and to the public, which injury and loss will continue unless further work stoppages are enjoined.

The Court further finds that if defendants are not enjoined from further striking they will cause the withdrawal of all of plaintiff's employees represented by defendants, plaintiff's operations will be paralyzed; that plaintiff will be forced to curtail or eliminate its services necessary to the transportation of perishable products and goods and property of California industries and of industries of other states, that plaintiff will be forced to curtail or eliminate its

passenger, mail and baggage services to the detriment of the public and the United States Government, which products, goods, properties, passengers, mail and baggage are continuously and necessarily carried by plaintiff to and from points throughout the United States; that plaintiff, its employees, the industries affected, interested railroads, the public and the United States Government will be deprived of large amounts of revenue and of supplies for the armed forces in Vietnam, of other defense materials, foodstuffs, goods, mail, baggage and other property which are daily carried by plaintiffs; that plaintiff's employees who are not interested in the subject matter of this case will be laid off and subjected to substantial loss of wages by the continuance of such strike; that such damages cannot be wholly estimated, calculated or compensated for in money, and that said damages will be immediate, substantial and irreparable. Said damages will be irreparable in that money damages will not compensate for injuries to the national defense effort in Vietnam nor be adequate compensation for the loss of business, livelihood, and service to the carrier, shippers, passengers, employees and the general public.

The Court further finds that the disputes and grievances which are the basis of defendants' strike and work stoppage do not concern changes in agreements, but instead concern the interpretation and application of existing agreements covering rates of pay, rules and working conditions and are minor disputes for which defendants have an appropriate ad-

ministrative procedure for handling with plaintiff. The Court further finds that this matter has been submitted to the National Railroad Adjustment Board for arbitration.

The Court concludes that the strike and work stoppages were conducted and caused by defendants in violation of the Railway Labor Act, 45 U.S.C. 151, et seq., and the issuance of a preliminary injunction is appropriate in these circumstances.

Now, Therefore, It Is Ordered that the defendants and all persons in active concert and participation with them, and all persons acting by, with, through or under them, or by their order, be and they are hereby restrained and enjoined from the following in furtherance of the disputes and grievances herein found by the Court to be minor disputes:

(1) threatening, calling, instigating, authorizing, encouraging, participating in, approving or continuing a strike, concerted layoff or other work stoppage, against the plaintiff and all acts in furtherance or in support thereof because of a dispute concerning the interpretation or application of the work rules contained in the agreement of January 27, 1972, between plaintiff and defendants;

(2) picketing or bannering the premises on which plaintiff conducts its operations, including the entrances and any other places where said premises are situated, from interfering with ingress to or egress from said premises, including the delivery, unloading, loading, dispatch

and movement of plaintiff's rolling stock and equipment and the contents thereof, or from loitering or congregating at or near any approaches thereto, and upon any public street or highway leading to or from any place which the employees of plaintiff or those having business with the plaintiff desire to enter or leave en route to or from said premises because of a dispute concerning the interpretation or application of the work rules contained in the agreement of January 27, 1972, between plaintiff and defendants;

(3) slowing down, laying off, or interfering with in anywise or manner the orderly and prompt continuance of work in plaintiff's operations because of dispute concerning the interpretation or application of the work rules contained in the agreement of January 27, 1972, between plaintiff and defendants;

(4) in any way carrying out or effectuating or conspiring to carry out or effectuate the activities enjoined in subdivisions (1), (2) and (3) hereof.

It Is Further Ordered that said defendants and each of them take all steps within their power to avert and prevent the resumption of the strike and work stoppage.

It Is Further Ordered that this Preliminary Injunction shall not be construed to require an individual to render service without his consent or to

make the quitting or resigning of an individual employee of plaintiff an illegal act.

It Is Further Ordered that this Preliminary Injunction is on condition that a bond be filed by plaintiff herein in the sum of $5,000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained. Said bond to be approved by the Clerk of this Court, or by the Court.

Dated: April 3, 1972.

/s/ Robert F. Peckham
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 72-2013

Southern Pacific Transportation Company, a corporation,
Plaintiff-Appellee,

vs.

United Transportation Union, a labor organization, (UTU), A. H. Chesser, President, (UTU), R. W. Guy, General Chairman, (UTU), G. R. Perkins, General Chairman, (UTU), R. H. Woodhams, Vice General Chairman, (UTU), John R. Burge, General Chairman, (UTU), and Does One through One Thousand, individually and as representatives of the aforementioned association,
Defendants-Appellants.

[February 1, 1974]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: DUNIWAY and WRIGHT, Circuit Judges, and EAST,* Senior District Judge.

EAST, Senior District Judge:

THE CASE

The defendants-appellants (Union) are, for our purposes, the representatives of the Switchmen em-

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

ployees of the plaintiff-appellee (Southern Pacific) and appeal from the District Court's order dated April 3, 1972, granting a restraint of a strike called and being conducted by the Union against Southern Pacific.

A brief narration of background history is warranted. In November of 1961, certain herder[1] agreements were entered into between Southern Pacific and the Switchmen, giving switchmen exclusive right to line switches in the performance of herding work and prohibiting the performance of this work by road crews. These agreements remained in effect until purportedly superseded by a National Agreement reached on August 2, 1971. The terms of the National Agreement were bargained for and negotiated over a period of nearly two years following a distressing national 18-day strike against the railroads, and the National Agreement was contentiously bargained for and provided that the national railroads would give the Union a 42 per cent wage hike in return for relaxation of a number of old contract work rules that had plagued the railroad industry by restricting work assignments to certain crafts within the Union. Because of a delay by proceedings for approval of the wage increases before the Pay Board, the 1971 agreement did not be-

[1]"Herders are taken from the ranks of switchmen and in fact, are switchmen, who perform yard service, usually by working alone, detaching engines from arriving road trains; lining necessary switches for movement of road engines to and from trains and roundhouse facilities; to allow trains and light engines to move into and out of tracks at ends of yards and line switches in roundhouse areas for movement of engines within such areas." Bush Affidavit dated March 10, 1972.

come effective until January 27, 1972. Immediately thereafter, the increases were paid to Union members and the nation's railroads sought to implement the new work rules and enjoy the consequent productivity increases. Specifically, Southern Pacific abolished sixteen herder positions pursuant to Article IX[2] of the National Agreement because they became unnecessary when Southern Pacific assigned its road crews (also represented by the Union) the work of attaching and detaching their engines to or from their road trains and line the switches necessary to move the engines between the engine service areas and the tracks where the trains rested, which work was theretofore performed by switchmen occupying the sixteen herder positions that were abolished.

The Union in turn called the subsequently enjoined strike even though none of the switchmen employed in the sixteen positions were laid off but all were absorbed into other work activities.

The District Court found that the dispute out of which the strike arose involved the interpretation and application of existing collective bargained agreements and, therefore, was a "minor dispute" as that term is used and applied to matters under the juris-

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[2]The pertinent parts are:

"*ARTICLE IX—ROAD-YARD MOVEMENTS*

Section 1. Road freight crews may be required at any point where yard crews are employed to do any of the following as part of the road trip, paid for as such without any additional compensation and without penalty payments to yard crews, holsters, etc.: . . . handle engines to and from train to ready track and engine house including all units coupled and connected in multiple; . . . ."

diction of the Railway Labor Act, 45 U.S.C. §151, et seq. The injunction was to permit utilization of the compulsory arbitration procedures of Section 3 of the Act, 45 U.S.C. §153, which provides for submission of such disputes to the National Railroad Adjustment Board (Adjustment Board). The dispute itself was submitted to the Adjustment Board on March 19, 1972, and is now pending before that forum.

ASSIGNMENT OF ERROR

The Union asserts that the District Court erred in that the undisputed record evidence required the District Court to deny all equitable relief to Southern Pacific because:

> "(1) [Southern Pacific] should be by the conduct of its president estopped to claim such relief because of its misrepresentations and bad faith in connection with the inception of the agreement on which the railroad relies.
>
> "(2) Because of fraudulent and mistaken representations so made at the inception of the agreement."

PARTIES' CONTENTIONS

We summarize Union's contentions as follows:

(a) That Article IX does not incorporate a separate oral agreement with Southern Pacific concerning its herders and reached and made during the course of the national bargaining negotiations. Hence, Article IX is not a binding agreement between these parties under the rationale of *Anaconda Wire and*

Cable Company v. National Labor Relations Board, 444 F.2d 1028 (7th Cir. 1971).

(b) Mr. Biaggini as president of Southern Pacific made certain false representations as to the number of herder positions which would be abolished under the proposed Article IX. That the Union relied in good faith upon those false representations and ceased further collective bargaining on the Article. Hence, Southern Pacific should be estopped to implement the Article adverse to those representations under the rationale of *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, citing *Insurance Co. v. Wilkinson,* 13 Wall. 222.

Accordingly, Union urges that the 1961 herder agreements with Southern Pacific are legally still effective and the dispute looks to a new agreement concerning switchmen-herder duty assignments and falls within the "major dispute" category as delineated in *Switchmen's Union of North America v. Southern Pacific Co.,* 398 F.2d 443 (9th Cir. 1968) at page 445, citing *Elgin, J. & E. Railway Co. v. Burley, et al.,* 325 U.S. 711, 723. Therefore, the restraint is violative of the Norris-LaGuardia Act, 29 U.S.C. §108.

Southern Pacific denies the actionable false statement factual premise urged by Union and further contends that:

(a) the National Agreement superseded the 1961 herder agreements, hence, Article IX is a valid subsisting agreement between the disputing parties, and

(b) the dispute arises from its reasonably susceptible implementation of Article IX and is a "minor dispute" within the jurisdiction of the Adjustment Board.

Accordingly, the restraint was proper under the rationale and holdings of *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156 (D. C. Circuit 1972), cited and followed in *Southern Pacific Transportation Co. v. International Brotherhood of Electrical Workers, et al.*, 474 F.2d 696 (9th Cir. 1973). We agree and affirm.

DISCUSSION AND CONCLUSIONS

Union's Contention (a)

We decline to burden this opinion with the details of the high level national character of the collective bargaining terminating in the National Agreement. Suffice, we have considered and conclude that Union's contention (a) above is without merit in fact and at law.

Union's Contention (b)

Manifestly the survival of this contention rests wholly and solely upon the factual picture presented by the evidentiary record. Our search of the record discloses that on June 31, 1972, after the agreement was signed, John Burge, General Chairman of Union, on Southern Pacific's lines, contended for the first time to L. D. Bush, Assistant Manager of Labor Relations for Southern Pacific, that Union believed Article IX was not national in scope and did not apply

to Southern Pacific as it did to other railroads, and that the 1961 agreement was still in effect, relying on two short in duration bargaining telephone conversations had on or about August 16, 1971, first, between Mr. Biaggini and Mr. Luna, as President of Union, and secondly, between Mr. Biaggini and Mr. Burge. The substance of those two telephone conversations is reflected only through the affidavit form averments of the parties to the telephone conversations. The averments are in conflict as to the exact statements made by Mr. Biaggini.

On their fact, the claimed conversations, viewed in a light most favorable to the union, do not support its claims. They relate only to the manner in which Southern Pacific proposed to implement the terms of Article IX, once it became effective. There was no misunderstanding as to what Article IX says. Thus the conversations relate only to the meaning of the language of Article IX as it applies to Southern Pacific and its union employees. The union does not seek rescission or reformation of Article IX. It claims that, as between Southern Pacific and the union, Article IX does not exist. This is nonsense.

The District Court found and concluded "that the disputes and grievances which are the basis of [Union's] strike and work stoppage do not concern changes in agreements, *but instead concern the interpretation and application of existing agreements* (italics supplied) covering rates of pay, rules and working conditions and are minor disputes for which

[Union has] an appropriate administrative procedure for handling with [Southern Pacific]."

Finally, we conclude that:

(1) The District Court's finding is not clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure.

(2) The National Agreement superseded the 1961 herder agreements and that Article IX thereof is a valid subsisting agreement between the parties hereto.

(3) "[Article IX is] reasonable susceptible to the interpretation sought [implementation thereof] by [Southern Pacific]" and the District Court's conclusion that the dispute leading to the strike involved herein is a minor dispute suitable for resolution by the Adjustment Board is right and sound. *International* at 1173.

AFFIRMED.